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Supreme Court No. 97501-9

IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

JAYAKRISHNAN K. NAIR,

Petitioner,

vs.

RICHARD J. SYMMES, Individually and on Behalf of the Marital
Community Comprised of RICHARD J. SYMMES and JANE DOE
SYMMES, and SYMMES LAW GROUP, PLLC, a Washington
Professional Limited Liability Company,

Respondents.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Jayakrishnan K. Nair (“Nair”) filed a legal malpractice lawsuit alleging that Richard Symmes, Jane Doe Symmes, and Symmes Law Group, PLLC (“Symmes”) negligently represented him in his federal bankruptcy proceedings. Nair previously made the same allegations in the bankruptcy court proceedings as the basis for opposing Symmes’s application for attorney’s fees. As a result, the trial court properly dismissed Nair’s claims against Symmes on the basis of collateral estoppel, and the Court of Appeals properly affirmed the dismissal.

Nair argues his Petition for Review should be granted because he did not have a full and fair opportunity to litigate Symmes’s alleged malpractice, but this assertion is belied by the multiple briefs he submitted, expert testimony, and oral argument at two separate hearings before the Bankruptcy Court. Additionally, the Court of Appeals’ unpublished decision does not present an issue of substantial public interest, as it only concerns the parties to this case; accordingly, this Court should deny Nair’s Petition for Review.

II. IDENTITY OF RESPONDENTS

Richard Symmes, Jane Doe Symmes, and Symmes Law Group, PLLC are the respondents to the petition for review filed by Jayakrishnan K. Nair.

III. ISSUE PRESENTED FOR REVIEW

Did the trial court and Court of Appeals err in dismissing Nair’s legal malpractice claim where the doctrine of collateral estoppel precludes Nair from re-litigating the issue of negligence and proximate cause, which were vigorously – and not summarily – litigated and resolved adversely to Nair in the prior bankruptcy proceeding?

IV. STATEMENT OF THE CASE

The Court of Appeals opinion sets out the facts in a fair, detailed fashion. Op. at 1-5. The following additional facts relate to litigation of Symmes’s alleged negligence in the bankruptcy proceedings.

A. The Bankruptcy Court Rejects Nair’s Argument that Symmes Was Negligent in the Bankruptcy Proceeding

Several months after withdrawing as counsel, Symmes filed a notice of hearing and application for attorney fees and costs in the bankruptcy court.¹ Nair, represented by new counsel, objected to this application.² Nair alleged that Symmes had been negligent and that his representation provided “a basis for a potential legal malpractice action[.]”³ Nair submitted a declaration from Brian Waid—an attorney who “has focused his legal practice primarily on malpractice claims by

¹ CP 53-56, 147. Symmes applied for \$16,868.75 in legal fees for 79.30 hours of service and \$576.42 in costs. CP 147; 150-51.

² CP 58-63.

³ CP 58-63.

clients against their former attorneys”⁴ and now his counsel of record in the present matter—in an effort to support his position.⁵ Waid opined that Symmes breached the standard of care by advising Nair to file for bankruptcy rather than settle with First Tech, by advising Nair to file under Chapter 13 when Nair did not qualify for relief under that chapter, and by advising Nair to convert to Chapter 11 rather than dismiss the bankruptcy case.⁶ Waid also opined that Symmes’s \$3,500.00 flat fee for the Chapter 13 filing was unreasonable.⁷

Symmes filed a reply to Nair’s objection, in which he denied Nair’s allegations of negligence and produced email correspondence between Nair and Symmes to rebut a number of Nair’s factual assertions.⁸

On February 3, 2017, a hearing was held on Symmes’s application.⁹ At the time of this first hearing, a second hearing was scheduled for February 17, 2017.¹⁰

In the meantime, Nair filed a response to Symmes’s reply.¹¹ Therein, Nair reiterated his claim that Symmes had breached the standard

⁴ CP 81.

⁵ CP 66-86.

⁶ CP 76-77.

⁷ CP 77.

⁸ CP 88-100, 104-119.

⁹ CP 140.

¹⁰ CP 140.

¹¹ CP 121-26.

of care and argued that Symmes's alleged negligence had proximately caused Nair to sustain damages.¹²

Symmes then filed a second reply, in which he explained why neither the declaration of Nair nor the attached exhibits provided evidence to support Nair's allegation of legal malpractice.¹³ Symmes again responded to Nair's arguments that Symmes was negligent and that his alleged negligence proximately caused damages to Nair.¹⁴

On February 17, 2017, a second hearing was held on Symmes's application for attorney fees and costs, and the court took the matter under advisement.¹⁵

The following month, the court issued a written order granting Symmes's application for attorney fees and costs.¹⁶ The order, which contained extensive findings of fact and conclusions of law,¹⁷ squarely addressed Nair's allegations of legal malpractice against Symmes—chiefly, the elements of breach and proximate cause.¹⁸

As for the issue of breach, the court concluded that Symmes did not breach the standard of care, whether before or after bankruptcy

¹² CP 121-26.

¹³ CP 128-38.

¹⁴ CP 128-38.

¹⁵ CP 140.

¹⁶ CP 140-51.

¹⁷ The 12-page order contained 29 findings of fact/11 conclusions of law. CP 140-51.

¹⁸ CP 140-51.

proceedings were initiated.¹⁹ The court specifically rejected the allegation that Symmes was negligent in advising Nair to file for bankruptcy, concluding it was reasonable to file a bankruptcy case for the benefit of the automatic stay of the foreclosure sale.²⁰

In light of the facts that [Nair] approached Mr. Symmes only three weeks before First Tech's foreclosure sale, insisted that he could not afford the settlement offer that Mr. Symmes was able to negotiate, and refused to allow the property to be sold at foreclosure, Mr. Symmes' advice to file a bankruptcy case for the benefit of the automatic stay was reasonable.^[21]

The court also rejected the allegation that Symmes was negligent in advising Nair to file under Chapter 13, concluding that it was a strategic move in anticipation of settling with First Tech.²²

Believing [Nair's] representations that he would have the necessary funds within the 30 days to complete the settlement and anticipating a relatively quick voluntary dismissal of the case, the decision to file a chapter 13 case was a strategic move to avoid the costs of a chapter 11 without putting the debtor's assets into the control of a chapter 7 trustee.^[23]

The court also rejected the allegation that Symmes was negligent in advising Nair to convert from Chapter 13 to Chapter 11, concluding that it

¹⁹ CP 149.

²⁰ CP 149.

²¹ CP 149.

²² CP 149.

²³ CP 149.

was reasonable given Nair's stated intent to remain in bankruptcy and prevent the foreclosure sale.²⁴

Similarly, [Nair] insisted upon avoiding the continued sale and remaining in bankruptcy when faced with the trustee's motion to dismiss and the continued foreclosure sale, despite Mr. Symmes' advice that [Nair] pursue a settlement outside of bankruptcy. Although the Court has no evidence as to the parties' discussion of chapter 11 planning pre-conversion, it was reasonable for Mr. Symmes to advise [Nair] to convert to chapter 11 given [Nair's] stated intent to remain in bankruptcy and prevent the foreclosure sale.^[25]

As for the issue of proximate cause, the court concluded that Nair failed to show that Symmes's advice caused him to suffer any damage, and that Nair's damages, if any, resulted from his own behavior.²⁶

[Nair] has also failed to show Mr. Symmes' advice caused him to suffer any damage. First, had [Nair] followed Mr. Symmes' repeated advice to settle with First Tech outside of bankruptcy, [Nair] would not find himself in this current position. Second, [Nair] remained in a chapter 11 case for 13 months, during which time he maintained control over his assets and could have proceeded to plan confirmation and quickly exited bankruptcy had he acted in accordance with the requirements of chapter 11. [Nair] increased the expense of this proceeding, lost control of his assets, and now finds himself in chapter 7 due [to] his own decisions not to file his tax returns, pay certain creditors, and find employment, not because of Mr. Symmes' advice or conduct. The Court communicated these requirements directly to [Nair] at the hearing on February 26, 2016, but [Nair] still failed to meet his responsibilities.^[27]

²⁴ CP 149.

²⁵ CP 149.

²⁶ CP 149-50.

²⁷ CP 149-50.

Ultimately, the court concluded that the fees requested by Symmes were reasonable and necessary and, in doing so, noted that the rate charged by Symmes was “heavily discounted from the market rate in this district.”²⁸

V. PROCEDURAL HISTORY

Nair filed a legal malpractice complaint against Symmes on June 26, 2017, in King County Superior Court.²⁹ On September 28, 2017, Symmes, filed a motion to dismiss under CR 12(b)(6).³⁰ Nair, now represented by attorney Brian J. Waid, opposed the motion.³¹ The Court granted dismissal on October 31, 2017.³² On April 3, 2018, Nair appealed the Superior Court’s decision, filing a brief with the Division I Court of Appeals for Washington State.³³ The Appeals Court affirmed the trial court’s dismissal on May 28, 2019.³⁴ On June 17, 2019, Nair filed a Motion for Reconsideration, which the Court ultimately denied on July 1, 2019.³⁵ Nair filed his Petition for Review on July 30, 2019.

²⁸ CP 150.

²⁹ CP 1-8.

³⁰ CP 17-30.

³¹ CP 196-202.

³² CP 218-19

³³ Appx 13 to Nair’s Petition for Review.

³⁴ Appx. 9 to Nair’s Petition for Review.

³⁵ Appx. 1-2 of Nair’s Petition for Review.

VI. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. Nair Does Not Meet the Requirements under RAP 13.4(b)

RAP 13.4(b) provides that a petition for review will be accepted by this Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) **If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.**

(Emphasis added.)

Nair concedes that he does not meet the requirements for review under RAP 13.4(b)(1)-(3) and instead attempts to argue that this unpublished decision involves an issue of substantial public interest. But whether Nair is collaterally estopped from re-litigating his malpractice claim against his prior bankruptcy counsel is not “a matter of continuing and substantial interest,” nor does it “present[] a question of a public nature which is likely to recur” for which “it is desirable to provide an authoritative determination for the future guidance.” *See, e.g., State v. Watson*, 155 Wn.2d 574, 578, 122 P.3d 903 (2005). This decision only

concerns the parties to this case; therefore, under RAP 13.4(b)(4) review of this case is not warranted.

B. Nair Had a Full and Fair Opportunity to Litigate the Alleged Malpractice

It is undisputed that four requirements must be met for collateral estoppel to apply: (1) there was a full and fair opportunity to litigate the issue in the previous action; (2) the issue was actually litigated in the action; (3) the issue was lost as a result of a final judgment in that action; and (4) the person against whom collateral estoppel is asserted in the present action was a party or in privity with a party in the previous action. *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1050 (9th Cir. 2008). Nair only contests whether he had a full and fair opportunity to litigate the malpractice claim in the bankruptcy proceeding.³⁶

The normal rules of res judicata and collateral estoppel apply to the decisions of bankruptcy courts. *In re Bono*, 70 B.R. 339, 342 (Bankr. E.D. N.Y. 1987) (citing *Katchen v. Landy*, 382 U.S. 323, 334, 86 S. Ct. 467, 15 L. Ed. 2d 391 (1966)). In deciding whether a party's opportunity to litigate is "full and fair," a court must make a judgment based on calculated considerations:

First, the court must compare the procedures in the prior and subsequent actions. If "procedural opportunities unavailable in the first action...could readily case a

³⁶ See Nair's Petition for Review at 10.

different result” in the second action, then the results of the first action generally should not be given preclusive effect. Second, the court must consider the parties’ incentives to litigate in the two actions. If a party had a good reason not to contest an issue vigorously during the first action and did not, in fact, vigorously contest the issue, that party generally should be entitled to relitigate the issue during the second action.

Maciel v. C.I.R., 489 F.3d 1018, 1023 (2007) (internal citations omitted).

Nair argues that review is appropriate because he did not have a “full and fair” opportunity to litigate his malpractice claim in bankruptcy court because the bankruptcy trustee owned the claim, not him. But the issue of who owned the malpractice claim is immaterial because Nair had standing and did – vigorously – litigate the issue of whether Symmes was entitled to his fees with every resource available.

After retaining new counsel, Nair filed multiple briefs opposing the application, submitted supporting affidavits and documentary exhibits, including lengthy expert testimony from his current counsel, and presented oral argument at two separate hearings on the application. Throughout, Nair maintained that Symmes had breached his duty of care and, in doing so, caused Nair to suffer harm. The vigor with which both parties litigated the fee application is reflected in the court’s 12-page order, which contained 29 findings of fact and 11 conclusions of law. The bankruptcy court granted Symmes’s request for fees because it determined – after

engaging in a thorough analysis – that Symmes met the standard of care, and therefore was owed his fees.

1. Nair had good reason to contest the fee application and did, in fact, do so.

Notwithstanding his staunch opposition to the fee application, Nair argues that he had no incentive to continue litigating in the bankruptcy court. This is so, he asserts, because the bankruptcy trustee owned the malpractice claim, not him. Nair misses the point, which is whether he had reason and, in fact, did litigate the issues in question in the fee application proceeding. But, even more importantly, Nair did have an incentive to litigate the fee dispute. Nair's conversion from Chapter 11 to Chapter 7 bankruptcy required him to pay Symmes's legal fees in full, providing him ample incentive to litigate the validity and competency of Symmes's legal representation. Nair stood to gain from the Court finding Symmes's representation to be below the standard of care, as he would no longer be responsible for the repayment of this debt.

The authority cited by Nair does not vindicate his position. Nair cites *Penthouse Media Group, Inc. v. Pachulski Stang Ziehl & Jones LLP*, 406 B.R. 453, 459-61 (S.D.N.Y. 2009), but the issue in that case was whether res judicata—not collateral estoppel—should bar a successive action. *Id.* at 459-61. Moreover, the plaintiff in *Penthouse* lacked an

incentive to litigate the malpractice issue in the bankruptcy court because, at the time of the fee application, it was still represented by the same attorney and expected its attorney to continue to advise it in the winding down of its bankruptcy proceeding. *Id* at 460. In determining that the plaintiff lacked a full and fair opportunity to litigate in bankruptcy court, the district court in *Penthouse* distinguished a number of cases where “at the time of the fee application the relationship between the professional and client had either already been terminated or had deteriorated based on the client’s dissatisfaction with that professional service.” *Id*. Ultimately, the court concluded “[i]t would be unreasonable to require a party to bring a malpractice claim against attorneys who still represent that party.” *Id*. at 461.

Here, in contrast to the facts in *Penthouse*, Nair was not represented by Symmes at the time the fee application was filed. Hence, Nair no longer expected Symmes to advise him in the bankruptcy proceedings. In fact, Nair retained new counsel, at least in part to assist in opposing Symmes’s fee application, and retained an expert witness to specifically opine on whether Symmes engaged in malpractice.

In sum, Nair had a full and fair opportunity to litigate in the bankruptcy court. Nair had an incentive to litigate in the first action and did so vigorously. Because Nair had a full and fair opportunity to litigate,


and because he does not dispute the remaining elements of collateral estoppel, it was proper for the trial court and Court of Appeals to preclude him from re-litigating the same issues in this subsequent action and dismiss his claim.

VII. CONCLUSION

Based upon the foregoing argument and authority, Nair's Petition for Review does not satisfy RAP 13.4(b) and should be denied.

DATED this 29th day of August, 2019.

FORSBERG & UMLAUF, P.S.

By: 

Lori Worthington Hurl, WSBA #40647
Jenna R. Goltermann, WSBA #49935
*Attorneys for Respondents Richard J.
Symmes and Symmes Law Group, PLLC*

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing ***ANSWER TO PETITION FOR REVIEW*** on the following individuals in the manner indicated:

Mr. Brian J. Waid
Waid Law Office
5400 California Avenue SW, Suite D
Seattle, WA 98136
Facsimile: 206-388-1925
(x) Via ECF

SIGNED this 29th day of August, 2019, at Seattle, Washington.

s/Shannon D. Walker
Shannon D. Walker

FORSBERG & UMLAUF, P.S.

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